

A **KALIAMAH RAJAN & ORS v. SUPRITENDAN WOUI KOOI
CHEANG, KETUA POLIS DAERAH TAMPIN, NEGERI SEMBILAN
& ORS**

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LEE KIEN HOW JC
B [ORIGINATING SUMMONS NO: WA-24NCVC-168-01-2021]
8 MARCH 2022

C **Abstract** – *The Malaysian Federal Constitution, unlike the
Constitution in other countries, is written and requires strict compliance
of the provisions contained therein. In the absence of any provision
spelling out for compensation in the event of a violation of constitutional
rights, any attempt by the courts in awarding such compensation under
the Federal Constitution is tantamount to unauthorised judicial
legislation and constitutes a breach of the doctrine of separation of
D powers; it follows that the claim for compensation pursuant to art. 5 of
the Federal Constitution by the dependants of the deceased who died in
police custody in this case must, of necessity, fail.*

E **CIVIL PROCEDURE:** *Action – Res judicata – Damages due to death in police
custody – Claim by dependants of deceased under art. 5 of Federal Constitution for
compensation for violation of constitutional right – Earlier suit dismissed pursuant
to s. 2 of Public Authorities Protection Act 1948 – Whether issues raised similar to
issues in earlier suit – Whether issues already determined and decided in earlier suit
– Whether claim barred by principle of res judicata*

F **CONSTITUTIONAL LAW:** *Constitutional rights – Personal liberty – Damages
due to death in police custody – Claim by dependants of deceased under art. 5 of
Federal Constitution ('FC') for compensation for violation of constitutional right –
Whether remedy provided under FC – Whether action within confines of ss. 7 and
G 8 of Civil Law Act 1956 and s. 2 of Public Authorities Protection Act 1948 –
Whether to allow application would tantamount to unauthorised judicial legislation
– Whether dependants established relevancy of claim to violation of rights*

H **LIMITATION:** *Public Authorities Protection Act 1948 ('PAPA') – Claim against
public authority – Death in police custody – Claim by dependants of deceased under
art. 5 of Federal Constitution for compensation for violation of constitutional right
– Whether claim bound by PAPA – Whether claim barred by 36-months limitation*

I The deceased, who was arrested by the police on 28 May 2013, died in
police custody at Tampin, Negeri Sembilan on 1 June 2013. The Coroner
Court, through an inquest proceeding, confirmed that the deceased had
passed away due to physical assaults, degrading treatment, abuse, torture and
unlawful acts of the defendants while the deceased was under police custody
in the lock-up. Following the inquest, the plaintiffs, the wife and children of

the deceased, brought a suit against the defendants at the Seremban High Court pursuant to s. 7 of the Civil Law Act 1956 ('CLA') for damages in tort for custodial death ('2018 Suit'). However, the 2018 Suit was struck out by the Seremban High Court on the ground that, pursuant to s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'), limitation period of three years had already set in, considering the date of the death of the deceased was on 1 June 2013. The plaintiffs' appeal to the Court of Appeal against the decision was dismissed on the same ground of limitation. Although leave to appeal was granted, the Federal Court dismissed the appeal. The plaintiffs subsequently filed encl. 1 before this court seeking compensation for the violation of the plaintiffs' constitutional right under art. 5(1) of the Federal Constitution ('FC'). The plaintiffs submitted, *inter alia*, that the present suit was for a declaration of constitutionality, which had not been the subject matter of the earlier action.

Held (dismissing encl. 1):

- (1) This court has the power to dismiss or stay any proceeding where the matter in question is barred by the doctrine of *res judicata* or due to any reason of multiplicity of proceedings in any court or courts. The proceeding, in such situation, ought not to be continued as provided under item 11 of the Schedule (Additional Powers of High Court) to the Courts of Judicature Act 1964. The 2018 Suit was dismissed due to the limitation period set out in the PAPA. The courts had not deliberated on the merit of the claims. Thus, the issue concerning compensation in encl. 1 due to the breach of constitutional rights of the plaintiffs had never been heard and decided before by the earlier courts in the 2018 Suit and thus it was not barred by the principle of *res judicata*. (paras 34 & 45)
- (2) The FC is silent on any remedy to be provided for any person whose constitutional right has been transgressed. Any claim for monetary redress in such cases must be done under and bound by the provision of relevant legislation. In view that the matter here was concerning damages due to the death in police custody, the action was within the confines of s. 7 and s. 8 of the CLA and s. 2 of the PAPA. Any attempt by the courts in awarding such compensation under the FC would indeed be tantamount to unauthorised judicial legislation and would constitute a breach of the doctrine of separation of powers which is the cornerstone of this nation. Therefore, the plaintiffs' application for compensation under the FC should be dismissed. (paras 49 & 53)
- (3) Based on para. 11 of the plaintiffs' supporting affidavit to encl. 1, the plaintiffs were claiming the right to compensation because of the breach of their art. 5 constitutional right and, therefore, the plaintiffs must establish and explain how the death of the deceased had caused the violation of their right under art. 5 of the FC. The plaintiffs had not

- A discussed nor established the link of encl. 1 with art. 5. Neither had they forwarded any explanation of how this case was relevant to the alleged art. 5 violation of their right. (paras 65, 66 & 73)
- (4) The plaintiffs had never specified clearly on which law and provision they were bringing this action. If they were suing on behalf of the estate or they are suing under s. 7(8) or any other section of the CLA, they must clearly state so in encl. 1 or encl. 2 with relevant exhibits. They had failed to do so. If indeed they were suing on behalf of the estate under s. 7(2), the letter of administration had not been exhibited. Hence, the only conclusion was that they were suing in their own capacities, but they had no *locus* to do so. Thus, on all counts, the plaintiffs had failed to establish their claim for compensation for the alleged constitutional violation. (paras 79 & 80)
- (5) The plaintiffs were attempting to re-litigate the similar, if not identical, issues of facts, law or mixed facts or law which had already been determined and decided in the 2018 Suit pertaining to s. 2(a) of the PAPA. The plaintiffs could and should have brought and submitted on the issue of the constitutionality of the PAPA during the appeal of the 2018 Suit before the Court of Appeal and the Federal Court respectively. Unfortunately, the plaintiffs had failed to do so. Thus, the plaintiffs were estopped by the doctrine of constructive *res judicata* to raise the issue of constitutionality of the PAPA in encl. 1. (paras 86 & 92)
- (6) The plaintiffs alleged that the claim was not bound by the PAPA because it was in relation to compensation due to the violation of their right guaranteed by the FC and the PAPA was primarily in relation to tortious or contractual claims. However, in the absence of any provision in the FC authorising any claim for such compensation due to constitutional violation, s. 2 of the PAPA was most crucial and relevant to encl. 1. There was nothing in s. 2 nor any other places in the PAPA to suggest that the PAPA is only confined to contractual disputes or tortious liability. Instead, it covers all types of claims against public authorities. Section 2(a) of the PAPA is clear that for such a claim, the limitation is 36 months. As the filing of this action was done 90 months after the death of the deceased, the claim was barred by the limitation set out in the PAPA and even by the Limitation Act 1953. (paras 95-98 & 101)
- (7) The plaintiffs contended that s. 2(a) of the PAPA violates the right to equality guaranteed under art. 8 of the FC. However, there was no discrimination to the plaintiffs, nor was there any unequal treatment. The 36-month limitation in the PAPA does not in any way run awry of art. 8 of the FC which guarantees equality treatment under the law to all persons. The PAPA is a statute to lay down the requirements for any

action against any person carrying out his or her public duties. One of the conditions is that such action must be commenced within 36 months after the act complained. The Legislature had enacted the PAPA relating to the protection of persons acting in the execution of statutory and other public duties which is different from the ordinary person. The PAPA treats all litigants who have any claim against public authorities alike. Therefore, the PAPA is not *ultra vires* art. 8 of the FC. (paras 103, 116, 118 & 124)

- (8) Modification is only required if there is any conflict. Modification to the PAPA is not required as 2(a) of the PAPA is not in conflict with the FC. The averment by the plaintiffs, that the Public Authorities Protection (Amendment) Act 1974 ('1974 Act') has only partially modified the PAPA and judicial modification is still needed, was misconceived. The 1974 Act was passed post-merdeka to reflect the 36-months current bar for any such actions. Therefore, no further modification is needed on the limitation period laid down therein. It followed that there was no need for this court to invoke art. 162(6) of the FC. It was therefore incorrect for the plaintiffs to allege that it was a pre-merdeka law which had not been modified or amended post-merdeka. It was also incorrect to argue that, in order to bring it in accord with the FC, this court must order for such modification. (paras 131, 134 & 135)

Case(s) referred to:

- Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 FC (*refd*)
Aqmal Dakhirrudin v. Azhar Ahmad & Anor [2019] 1 LNS 492 CA (*refd*)
Ashley v. Chief Constable of Sussex Police [2008] 2 WLR 975 (*dist*)
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*refd*)
Assa Singh v. Mentri Besar, Johore [1968] 1 LNS 9 FC (*refd*)
Attorney General of Trinidad and Tobago v. Ramanoop [2006] 1 AC 328 (*dist*)
B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC (*refd*)
Brunsdon v. Humprey [1884] 14 QBD 141 (*refd*)
Cassell & Co Ltd v. Broome [1972] AC 1027 (*refd*)
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA (*refd*)
Chua Wee Seng v. Fazal Mohamed [1970] 1 LNS 19 HC (*refd*)
Cullen v. Chief Constable of the Royal Ulster Constabulary [2004] 2 All ER 237 (*refd*)
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC (*refd*)
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC (*refd*)
DK Basu v. State of West Bengal [1997] 1 SCC 416 (*refd*)
Government Of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22 FC (*refd*)
Harmenderpall Singh Jagara Singh v. PP [2004] 1 LNS 555 HC (*refd*)
Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC (*refd*)
Henderson v. Henderson (1843) 3 Hare 100 (*refd*)
Heng Wooi Kim & Anor v. Bayview Properties Sdn Bhd [1997] 3 CLJ 711 HC (*refd*)
Instant Bonus Development Sdn Bhd v. Wong Ching Yong & Anor; Malaysia Building Society Bhd (Intervener) [2021] 1 LNS 1353 HC (*refd*)
Kaliamah Rajan & Yang Lain lwn. Superintenden Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain [2020] 9 CLJ 252 CA (*refd*)

- A** *Kamarul Ariffin Jait & Ors v. Zuraini Osman* [2016] 8 CLJ 257 HC (*refd*)
Kenderaan Bas Mara v. Yew Bon Tew & Anor [1979] 1 LNS 38 FC (*refd*)
Kerajaan Malaysia v. Mat Shuhaimi Shafiei [2018] 3 CLJ 1 FC (*refd*)
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC (*refd*)
Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA (*refd*)
Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals
[2018] 1 CLJ 585 FC (*foli*)
- B** *Khairul Anwar Abd Aziz & Anor v. Pakiam Vitilingam & Anor* [2009] 1 LNS 1618 HC (*refd*)
Khuang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 SC (*refd*)
Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC (*foli*)
- C** *Latchmandas v. State of Bombay* [1952] 54 Bom LR 854 (*refd*)
Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals [2022] 3 CLJ 177 FC (*refd*)
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC (*foli*)
Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC (*refd*)
- D** *Maharaj v. Attorney-General of Trinidad & Tobago (No. 2)* [1979] AC 385 (*refd*)
Malaysian Bar & Anor v. Kerajaan Malaysia [1987] 1 CLJ 459; [1987] CLJ (Rep) 185 SC (*refd*)
Md Khalil Khan v. Mahbub Ali Mian AIR 1949 PC 78 (*refd*)
Merson v. Cartwright [2005] UKPC 38 (*dist*)
Mohanlal Jain v. Maharaja of Jaipur AIR 1962 SC 73 (*refd*)
- E** *Ng Kong Choon v. Tan Wee Goh* [2016] 3 SLR 935 (*refd*)
Nik Noorhafizi Nik Ibrahim & Ors v. PP [2014] 2 CLJ 273 CA (*refd*)
Nilabati Behera v. State of Orissa [1993] 2 SCC 746 (*refd*)
Nyambirai v. National Social Security Authority [1996] 1 LRC 64 (*refd*)
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA (*refd*)
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC (*refd*)
- F** *PP v. Su Liang Yu* [1976] 1 LNS 113 HC (*refd*)
Re a debtor (No 472 of 1950), ex p Swirsky [1958] 1 WLR 283 (*refd*)
Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC (*refd*)
Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan [1982] CLJ 151; [1982] CLJ (Rep) 299 FC (*refd*)
- G** *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245 FC (*refd*)
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC (*refd*)
SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors [1997] 2 CLJ 564 CA (*refd*)
- H** *Superintendent Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman* [2020] 2 CLJ 425 FC (*refd*)
Syed Mohd Salie Labbai v. Mohd Haniffa [1976] 4 SCC 780 (*refd*)
Telfair Shipping Corporation v. Inersea Carriers [1983] 2 Lloyds 351 (*refd*)
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA (*refd*)
- I** *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC (*refd*)
Tong Lee Hwa & Anor v. Lee Yoke San [1978] 1 LNS 218 FC (*refd*)
Truax v. Corrigan 257 US 312 (*refd*)

- Wakil-Wakil Diri Kepada Mahadevi Nadchatiram (Deceased) v. Hong Leong Bank Bhd* [2014] 1 LNS 755 CA (*refd*) A
- Wilson v. United Counties Bank Limited* [1920] AC 102 (*refd*)
- Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581 (*refd*)
- Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631 FC (*refd*)
- Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581 FC (*refd*) B

Legislation referred to:

- Civil Law Act 1956, ss. 7(2), (5), (8), 8(2)
- Courts of Judicature Act 1964, Schedule item 11
- Federal Constitution, arts. 5(1), 8(1), 69(2), 149, 162(1), (6), (7) C
- Public Authorities Protection Act 1948, s. 2(a)
- Road Transport Act 1987, s. 96(3)
- Rules of Court 2012, O. 28 r. 8
- Rules of the High Court 1980, O. 28 r. 8(1), O. 88 r. 2(1)
- Constitution of Indian [India], arts. 32, 226 D
- The Constitution of the Bahamas Commonwealth of the Bahamas [Bahamas], art. 28
- For the plaintiffs - Gopal Sri Ram, Manoharan Tevadasin, Mathan Raj Subramanian, & Yasmeen Soh Sha-Nisse; M/s Ong & Partners*
- For the defendants - Nur Fauzani & Raja Zaizul Faridah; SFCs & Afiq Zainal; FC* E
- Reported by S Barathi*

JUDGMENT

John Lee Kien How JC:

F

Introduction

Facts Of The Case

[1] The first plaintiff (“P1”) is the wife of the late Karuna Nithi (“the deceased”) and the second and third plaintiffs (“P2” and “P3”) are the children of the deceased. The first, second and third defendants were Tampin District Police Chief, Negeri Sembilan Head Chief Police and Tampin Head Police respectively. The fourth to 13th defendants were the police officers at Tampin lock-up. The 14th defendant and 15th defendant were Chief Police of Malaysia and Home Affairs Minister respectively. The 16th defendant is the Government of Malaysia. G H

[2] The deceased was arrested by the police on 28 May 2013. He died in police custody at Tampin, Negeri Sembilan on 1 June 2013. The Coroner Court through an inquest proceeding dated 28 January 2015 had confirmed that the deceased passed away due to physical assaults, degrading treatment, abuse, torture and unlawful acts of the defendants while the deceased was under the police custody in the lock-up. I

- A [3] Following the inquest, the plaintiffs brought suit against the defendants on 25 January 2018 in the Seremban High Court *vide* Suit No. NA-21NCvC-03-01-2018 pursuant to s. 7 of Civil Law Act 1956 (“the CLA”) for damages in tort for custodial death (“the 2018 suit”).
- B [4] However, the 2018 suit was struck out by the Seremban High Court on the ground that pursuant to s. 2(a) of Public Authorities Protection Act 1948 (“PAPA”), limitation period of three years has already set in, considering the date of the death of the deceased was on 1 June 2013.
- C [5] The plaintiffs’ appeal to the Court of Appeal against the High Court decision was dismissed on the same ground of limitation. On 28 August 2019, leave to appeal was granted and later the Federal Court dismissed the appeal.
- [6] The plaintiffs then filed an originating summons (“encl. 1”) in this court for:
- D (i) a declaration that the defendants are liable to pay the plaintiffs such compensation as may be assessed by this court for the violation of the plaintiffs’ right under art. 5 of the Federal Constitution (“the FC”) by causing death of the deceased while in custody of the first to the 13th defendants and being the servants or agents of the 16th defendant;
- E (ii) an order that the defendants pay compensation to the plaintiffs;
- (iii) an order that the defendant pay to the plaintiffs exemplary damages for violation of the plaintiffs’ rights guaranteed by Part II of the FC;
- F (iv) a declaration that s. 2(a) of PAPA is *ultra vires* art. 8 and/or art. 69(2) of the FC; and
- (v) a consequential order that the said s. 2(a) of PAPA be modified in accordance with art. 162(6) and (7) of the FC to bring the same into accord with the Constitution by either repealing the said section or by amending it by substituting the words ‘36 months’ to ‘22 months’.
- G *Submission By The Plaintiffs*
- [7] The plaintiffs filed encl. 1 before this court to seek compensation for the violation of the plaintiffs’ constitutional right under art. 5(1) of the FC.
- H [8] The plaintiffs submitted that the present suit is for a declaration of constitutionality, which had not been the subject matter of the earlier action. The earlier action was to claim for damages in tort pursuant to s. 7 of the CLA.
- I [9] The plaintiffs argued that the same set of facts may give rise to more than one cause of action. They referred to the cases of *Telfair Shipping Corporation v. Inersea Carriers* [1983] 2 Lloyd’s 351, *Brunsdon v. Humprey* [1884] 14 QBD 141, *Md Khalil Khan v. Mahbub Ali Mian* AIR 1949 PC 78, *Wilson v. United Counties Bank Limited* [1920] AC 102, *Ng Kong Choon v. Tan Wee*

Goh [2016] 3 SLR 935, *Tong Lee Hwa & Anor v. Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ 24 and *Syed Mohd Salie Labbai v. Mohd Haniffa* [1976] 4 SCC 780.

A

[10] The previous suit was an action in tort and under private law. The present suit is an action in public law for constitutional compensation. They are two separate and distinct causes of action, according to the plaintiffs.

B

[11] Thus, the plaintiffs mooted that they were not incumbent to bring all these causes of action in the same suit.

Constitutional Compensation

[12] The plaintiffs submitted that they are entitled to constitutional compensation for the breach of their fundamental rights and they further submitted that one of the appropriate remedies for the breach of a fundamental right guaranteed by the Constitution is an award of monetary compensation under the FC.

C

[13] They cited cases of *Maharaj v. Attorney-General of Trinidad & Tobago* (No. 2) [1979] AC 385, *Cullen v. Chief Constable of the Royal Ulster Constabulary* [2004] 2 All ER 237, *Nilabati Behera v. State of Orissa* [1993] 2 SCC 746 and *DK Basu v. State of West Bengal* [1997] 1 SCC 416 as support.

D

The Constitutionality Of Section 2(a) Of PAPA

E

[14] The plaintiffs further contended that s. 2(a) of PAPA violates the plaintiffs' right under art. 8(1) reading with art. 5(1) of the FC because PAPA discriminates against the plaintiffs by imposing a three-year limitation when they sue a public authority.

[15] Apart from that, the plaintiffs further alleged that in order to avoid the application of PAPA, the plaintiffs have the additional burden of proving malice or the existence of a collateral period of limitation applies.

F

[16] The plaintiffs argued that s. 2(a) of PAPA is also invalid because it violates art. 69(2) of the FC, as it rendered the right of a plaintiff to sue the Government illusory by imposing an arbitrary period of 36 months instead of six years.

G

[17] They quoted the cases of *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169, *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289, *Assa Singh v. Mentri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30, *Superintendent Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman* [2020] 2 CLJ 425 and *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277 as well as *Mohanlal Jain v. Maharaja of Jaipur* AIR 1962 SC 73, *Truax v. Corrigan* 257 US 312, and *Latchmandas v. State of Bombay* [1952] 54 Bom LR 854 as authorities.

H

I

- A [18] According to the plaintiffs, PAPA also offends the rule of law and violates the equal protection provision in art. 8(1) of the FC as explained in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 and *Nyambirai v. National Social Security Authority* [1996] 1 LRC 64 and *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333.

B Exemplary Damages

- C [19] This court, according to the plaintiffs, is entitled to award aggravated damages to the plaintiffs because the cause of action concerns the breach of constitutionally guaranteed fundamental right. They relied on *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365, *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585 and *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141 for this argument.

D Submissions By The Defendants

- E [20] The defendants submitted that s. 2(a) of PAPA does not *ultra vires* art. 8(1) and/or art. 69 of the FC. They relied on the cases of *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245, *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, *SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors* [1997] 2 CLJ 564; [1997] 2 MLJ 538, *Letitia Bosman (supra)* and *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155.

- F [21] The defendants further averred that they are not liable to pay compensation and exemplary damages to the plaintiffs as the plaintiffs are precluded by the limitation enshrined in s. 2(a) of PAPA. The defendants cited the case of *Kenderaan Bas Mara v. Yew Bon Tew & Anor* [1979] 1 LNS 38; [1980] 1 MLJ 311 for this.

- G [22] The plaintiffs' filing of encl. 1, according to the defendants' submission, is precluded by the doctrine of *res judicata*. The defendants referred this court to the case of *Kerajaan Malaysia v. Mat Shuhaimi Shafiei* [2018] 3 CLJ 1; [2018] 2 MLJ 133 and *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783.

- H [23] The defendants also premised that the plaintiffs were at fault to adopt a wrong mode to begin the proceeding. Thus, the defendants argued that this suit requires full trial to peruse all witness statements and exhibits before this court could deliver any judgment. This is by virtue of O. 28 r. 8 of the Rules of Court 2012 ("ROC 2012"). They referred this court to a couple of Federal Court's cases namely, *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 and *Aqmal Dakhirrudin v. Azhar Ahmad & Anor* [2019] 1 LNS 492.

[24] The defendants further contended that PAPA is a valid law and thus any claim against the Government shall be made within stipulated time as prescribed in s. 2(a) PAPA. The defendants relied on *Letitia Bosman (supra)* as the authority on this.

[25] According to the defendants, the plaintiffs do not have any *locus standi* to file any claim against the defendant by virtue of s. 7(2) of the CLA. They found support in the cases of *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, *Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299 and *Wakil-Wakil Diri Kepada Mahadevi Nadchatiram (Deceased) v. Hong Leong Bank Bhd* [2014] 1 LNS 755, *Kamarul Ariffin Jait & Ors v. Zuraini Osman* [2016] 8 CLJ 257; [2016] MLJU 1228 and *Kaliamah Rajan & Yang Lain lwn. Superintenden Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain* [2020] 9 CLJ 252; [2020] 12 MLJ 334.

Findings And Decisions By The Court

[26] Having appraised the facts adduced by the parties through affidavits and after perusing the submissions by learned counsels for both parties, it is my decision to dismiss encl. 1. Herein are my reasons.

Originating Summons

[27] The defendants argued that the plaintiffs are at fault to adopt a wrong mode to begin the proceeding. In other words, the plaintiffs, according to the defendants, should have begun the proceeding by way of writ summons. This is because this case involves substantial dispute as to the material facts especially pertaining to negligence, assault and torture which eventually led to the death of the deceased in the custody.

[28] Thus, the defendants alleged that this suit requires full trial, to peruse all witness statements and exhibits before this court could deliver any judgment. This is by virtue of O. 28 r. 8 of ROC 2012.

[29] They referred this court to the then Federal Court's case of *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 where the Supreme Court explained in length about the appropriate mode to begin a proceeding for a party who sought a declaration by the court.

[30] In that case, on 19 June 1984 Har Lee Enterprise Sdn Bhd (HLE) and the respondent entered into two building contracts to construct a complex. However, dispute arose on the completion of the said works. On 20 May 1988 the arbitrator made an award in favour of the respondent. To enforce the award the respondent examined the appellants, directors of HLE, pursuant to judgment debtor summons. The facts unearthed by the

- A examination prompted the respondents to bring this application. The trial judge dealt with the application summarily under O. 88 r. 2(1) Rules of the High Court 1980 (“RHC”). The appellants’ counsel argued that the trial judge should have gone under O. 28 r. 8(1) RHC especially in the light of the plea of fraud and the conflicting affidavit evidence.
- B [31] Mohd Jemuri Serjan CJ (Borneo) in this case held that (at p. 339):
- C Unquestionably, these conflicts in the evidence can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined on their evidence which, however, is not possible in proceedings begun by originating summons. To add to the uncertainty of the facts the deponents of both affidavits of the appellants and the respondents were not cross-examined to ascertain the veracity or otherwise of their evidence. It would seem that both parties were contended to rest their case on their affidavits only where such affidavits do not unequivocally bear testimony conclusively and positively to the various allegations but are themselves open more than one interpretation ...
- D [32] Another case referred by the defendant is a Court of Appeal case: *Aqmal Dakhirrudin v. Azhar Ahmad & Anor* [2019] 1 LNS 492. This was an appeal by the appellant (the injured party) against the judgment of High Court which allowed the originating summons by the second respondent for a declaration that the insurance policy is null and void and unenforceable under s. 96(3) of the Road Transport Act 1987. Hanipah Farikullah JCA held (at p. 21) that:
- E [41] We have also carefully considered the other complaint that the 2nd defendant makes about the learned Judge’s approach in accepting the statutory declarations relied on by the plaintiff has affected the ultimate conclusion to which she came.
- F [42] In the present case, the statutory declarations did not explain the circumstances or reasons why the vehicle alleged to belong to Sufiah but remains registered in the name of the 1st defendant. *In a case of this sort, where the facts are disputed and contradicting to the contemporaneous documents, we are of the view that this case is not to be decided by way of originating summons.*
- G (emphasis added)
- H [33] While I have no qualm about the legal position stipulated by those cases, I disagree with the defendants’ averment that our present case is not a suitable case for originating summons. In this case, the prayers sought by the plaintiffs are declaratory in nature. The arguments and issues are all constitutional and statutory interpretation and analysis oriented. There is no substantial dispute as to the facts or documents. It is therefore apt for it to continue in originating summons. I shall now continue with the discussion on my findings on the merit of this case.
- I

Compensation Due To Infringement Of Constitutional Rights And Exemplary Damages A

Res Judicata

[34] It is trite law that this court has the power to dismiss or stay any proceeding where the matter in question is barred by the doctrine of *res judicata*, or due to any reason of multiplicity of proceedings in any court or courts. The proceeding, in such situation, ought not to be continued as provided under item 11 of the Schedule (Additional Powers of High Court) to the Courts of Judicature Act 1964. B

[35] In the landmark case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, the Supreme Court explained as follows: C

What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation - interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem cause*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy ... D E

The starting point ought to be the celebrated passage by Wigham VC in the case of *Henderson v. Henderson* (1843) 3 Hare 100 at p 115 which is: F

The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. G

[36] The apex court in *Asia Commercial Finance (M) Bhd (supra)* then went on to say:

Thus, there are in fact two kinds of estoppel per *rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type. H

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, *ie*, the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is *res judicata*. I

- A In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per *rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.
- B [37] With regards to encl. 1, the defendants argued that the plaintiffs' application was barred by the doctrine of *res judicata* because the causes of action, facts, and issues that were raised in this suit are similar with those in the 2018 suit and thus ought to have been raised in the 2018 suit.
- C [38] The plaintiffs in their application, amongst others, pray for a declaration that the defendants are liable to pay the plaintiffs such compensation as may be assessed by this court for the violation of the plaintiffs' right under art. 5(1) of the FC by causing the death of the deceased.
- D [39] The plaintiffs further premised that the application in encl. 1 deals with constitutional compensation and thus it is different from that of the 2018 suit which dealt with damages in tort pursuant to s. 7 of the CLA.
- E [40] It is my view that the claim for compensation (under prayers 1, 2 and 3) in encl. 1 is not precluded by the doctrine of *res judicata* as it has never been adjudicated in the 2018 suit. This is, however, not applicable to prayers 4 and 5 the detail of which would be discussed in the second part of this judgment. The discussion in this first part is only focusing on prayers 1, 2 and 3 namely whether they are barred by the doctrine of *res judicata*.
- F [41] The conditions to constitute a matter *res judicata* were fully articulated by Sharma J in an earlier case of *Chua Wee Seng v. Fazal Mohamed* [1970] 1 LNS 19; [1971] 1 MLJ 106 (at p. 107 (MLJ)):
- To constitute a matter *res judicata* the following conditions must be fulfilled:
- G (1) The matter directly and substantially in issue the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit;
- H (2) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
- (3) The parties as aforesaid must have litigated under the same title in the former suit;
- (4) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which issue is subsequently raised;
- I (5) **The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.** (emphasis added)

[42] The exception to the *Henderson* rule (as enumerated by Wigram VC in *Henderson v. Henderson* (1843) 3 Hare 100) is applicable in this matter. The implication is clear that for the *Henderson* rule to be operative, the subject matter to which it properly belongs must itself have been rendered final and conclusive and on the merits in the earlier suit. In other words, unless it can be shown that there has been a final and conclusive decision on the merits in respect of the subject of litigation before the original court, there cannot be a *Henderson* abuse of process plea in respect of the non-litigated subject matter in the subsequent proceedings.

[43] Thus, the *Henderson* rule was not operative in *Re a debtor (No 472 of 1950), ex p Swirsky* [1958] 1 WLR 283 at pp. 291 to 292, where Jenkins LJ held that:

It is true that he failed in his object, but he failed ... not because he was remiss in bringing the matter forward ... [the] matter was raised, in my view, and quite clearly raised, but it **was never adjudicated**. [thus he] failed to pursue the other part of his claim to a successful conclusion.

(emphasis added)

[44] This court also refer to another High Court case of *Heng Wooi Kim & Anor v. Bayview Properties Sdn Bhd* [1997] 3 CLJ 711 which discussed further the doctrine of *res judicata*. His Lordship Jeffrey Tan J (as His Lordship then was) (at p. 723, paras. d-h and p. 724) discussed in length the doctrine of *res judicata*:

A party who relies upon the doctrine of *res judicata* “must show either an actual merger or **that the same point has already been decided between the same parties**” (per William J in *Nelson & Couch* 15 CBNS 99)

...

“The question whether a defendant is being vexed again for the same cause of action depends not upon technical considerations but upon substance” (*Brunsdun v. Humphrey* 14 QBD 141) ... (emphasis added)

[45] The 2018 suit was dismissed due to the limitation period set out in PAPA. The courts had not deliberated on the merit of the claims. Thus, in this present suit, I am of the view that the issue concerning compensation sought by the plaintiffs in encl. 1 due to the breach of their constitutional rights has never been heard and decided before by the earlier courts in the 2018 suit and thus it is not barred by the principle of *res judicata*.

Constitutional Compensation

[46] I shall now discuss the substance of the plaintiffs’ claim under prayer 1, prayer 2 and prayer 3 which are related with the compensation sought by the plaintiffs due to the alleged violation of their rights. Primarily, the plaintiffs are seeking a declaration that the defendants are liable to pay the

- A plaintiffs such compensation as may be assessed by this court for the violation of the plaintiffs' right under art. 5 of the FC. The said art. 5 of the FC provides that:

PART II

B FUNDAMENTAL LIBERTIES

Liberty of the person

5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- C (2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
- (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
- D

(4) Where a person is arrested and not released, he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

- E
- Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall have been an integral part of this article as from Merdeka Day:

- F
- Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":

- G
- And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

- H (5) Clauses (3) and (4) do not apply to an enemy alien.

- I [47] For guidance, I first refer to the Federal Court case of *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2018] 3 MLJ 184. The net effect of the majority of the court in this case was that there is no monetary redress under the FC for a person whose constitutional rights have been transgressed despite a constitutional guarantee to that effect in art. 5(1) of the FC. Zaharah Ibrahim FCJ (as Her Ladyship then was), (delivering majority judgment of the court) held that (at p. 622 (CLJ); p. 235 (MLJ)):

[121] As our Federal Constitution does not have provisions similar to those utilised in *Ramanoop* and *Merson*, a claimant has to look elsewhere for redress. The only law available is the CLA with its limitations, including the bar in s. 8 to the grant of exemplary damages.

A

[48] The case of *Nurasmira (supra)* was later referred to by another Federal Court case of *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365. The appellants in this appeal were sued by the respondents, the joint administrators of the estate of one Chandran a/l Perumal (the deceased). The suit was filed following his demise on the fifth day whilst in police custody pursuant to his arrest, with three others, on suspicion of kidnapping a newborn baby. As found by the coroner, following an inquest into his death, the deceased died of hypertensive heart disease and the claim put forth by the respondents was for losses suffered by his estate and lawful dependants by reason thereof which they alleged was due to the wrongful acts of the appellants. Rhodzariah Bujang FCJ, (delivering majority judgment of the court), after examining our FC and the constitutions of the other jurisdictions, at p. 174 (CLJ); p. 405 (MLJ) held that there is no provision in the FC which provides redress for any infringement of constitutional right:

B

C

D

[28] Secondly, and most obviously, **there is nothing in the Federal Constitution which provides in any direct or vague way, the right of the estate of a deceased to such damages**, unlike those constitutional provisions in *Assa Singh's* case and *Sagong Tasi's* case. Saying this should not in any way be interpreted to mean that I am demeaning our constitutional guarantee of right to life and/or condoning the acts of the deceased's custodians in this case for their wrongful actions should indeed be punished. However, the alleged incongruity of the law in this respect must be cured by Parliament and not the court given the principles of statutory interpretation and the clear constitutional provision which I have enumerated earlier in deciding otherwise would, in the words of Abdooldader SCJ in *Television Broadcasts Ltd & Ors* [1985] 2 MLJ 34, 'amount to unwarranted transgression into the legislative domain'. Therefore, whilst the house of Lords in *Ashley's* case could circumvent the same statutory prohibitions in their law since their constitutional is unwritten, I could not do the same because of art 162(6).

E

F

G

(emphasis added)

[49] In our present suit, the plaintiffs claimed that the defendants are liable to pay compensation under the constitution for the violation of right to life under art. 5 of the FC. It is my view that the FC is silent on any remedy to be provided for any person whose constitutional right has been transgressed. As vividly highlighted by Her Ladyship Rhodzariah Bujang FCJ, there is no written constitution in the United Kingdom. Hence, the House of Lords in *Ashley v. Chief Constable of Sussex Police* [2008] 2 WLR 975 was free to order for such constitutional compensation. As for the constitution of the Trinidad

H

I

- A and Tobago, as analysed by Her Ladyship Zaharah Ibrahim FCJ (as Her Ladyship then was) in *Nurasmira (supra)*, there is such an express provision in it specifying such compensation in the event of any violation of any rights guaranteed by the Constitution. Thus, not surprisingly, the Privy Council in *Attorney General of Trinidad and Tobago v. Ramanoop* [2006] 1 AC 328 ordered
- B such compensation in accordance with that proviso in the constitution of Trinidad and Tobago. The same applies to the Supreme Court and the Privy Council in *Merson v. Cartwright* [2005] UKPC 38. The Constitution of the Bahamas has provided for such compensation under art. 28. Our FC is different. It is written and thus requires strict reliance of the content therein.
- C It has no provision to provide any compensation in the event of such violation of rights. As stressed upon by Her Ladyship Rhodzariah Bujang FCJ that there cannot be any unwarranted transgression into the legislative domain. Any attempt by the courts in awarding such compensation under the FC would indeed be tantamount to unauthorised judicial legislation and would constitute a breach of the doctrine of separation of powers which is
- D the cornerstone of this nation. Therefore, based on these reasons mentioned above, the plaintiffs' application for compensation under the FC should be dismissed, and this decision is guided by the majority judgments in both *Koperal Zainal (supra)* and *Nurasmira (supra)* to which, based on the doctrine of *stare decisis*, I am bound.
- E [50] Leading counsel for the plaintiffs, Datuk Sri Gopal Sri Ram has quoted numerous cases from other jurisdictions in order to convince this court the declaration under prayers 1, 2 and 3. In view that all these cases were also before the courts in both *Nurasmira (supra)* and *Koperal Zainal (supra)* and that the majority of the courts in both of them have made it clear that
- F unlike the constitutions of the other jurisdictions, there is no provision and procedure for monetary compensation in our FC, I do not see any need to embark on any further discussion. Suffice to say that those cases are, as reasoned by our apex courts in both *Nurasmira (supra)* and *Koperal Zainal (supra)*, either distinguishable or not suitable for our local conditions. *Nilabati (supra)*, for instance, was decided in view of the obvious provision
- G in art. 32 and art. 226 of the Indian Constitution providing such remedy (at p. 758d-e of the report). Foreign decisions are persuasive at best especially in view that our apex court has formulated and laid down crucial *ratio* on this. These *ratios* and precedent of both *Nurasmira (supra)* and *Koperal Zainal (supra)* are clearly binding on this court.
- H [51] The lead counsel for the plaintiffs has also impressed upon this court to adopt the view and discussion of the dissenting judgments in both of these Federal Court cases, namely, *Nurasmira (supra)* and *Koperal Zainal (supra)* as well as the dissenting judgment of Hamid Sultan Abu Backer JCA in
- I *Nik Noorhafizi Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273; [2013] 6 MLJ 660 (at para [76]). However, by the obvious operation of the doctrine of *stare*

decisis, I am duty-bound to adopt the view and the decision of the majority view of the apex court and the Court of Appeal in all these cases. As emphatically and dogmatically asserted by Her Ladyship Tengku Maimun Tuan Mat CJ in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581; [2021] 3 MLJ 759.

[211] *The importance of adherence to the doctrine of stare decisis lies in the fact that it has become the cornerstone of the common law practiced in the country. It is fundamental that decisions of the courts, especially of the apex court, ought to be consistent, in the interests of finality and certainty in the law. Otherwise, the public and lawyers who have regulated their affairs in reliance on a ratio decidendi before its overruled will face difficulty and confusion in organising their affairs around such judgments and this in turn will affect public confidence in the Judiciary.* (See *Dato' Tan Heng Chew v. Tan Kim Hor* [2009] 2 MLJ 293; *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276. See also *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 MLJ 149) ... (emphasis added)

[52] Also in the case of *Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631; [2021] 1 MLJ 478, Her Ladyship Tengku Maimun Tuan Mat CJ has further reiterated and elucidated that, dissenting judgments have no force of law:

[57] **It is trite law that dissenting judgments have no force of law.** See for example a comment by the United States' Supreme Court in *United States R Retirement Bd v. Fritz* (1980) 449 US 166 at footnote 10, per Rehnquist J:

The comments in the dissenting opinion ... are just that: comments in a dissenting opinion ...

[58] Here the rule has statutory recognition by virtue of ss. 74 and 77 of the CJA 1964. s. 74 requires that all proceedings of the Federal Court shall be disposed of by three judges or such greater uneven number of judges while s. 77 stipulates that the said proceedings shall be determined in accordance with the majority opinion of the judges composing the court. It therefore stands to reasons that legally speaking, **minority judgments do not have any force of law** as between the parties in that suit. **Nevertheless, they play an important role in subsequent cases in the development of the law** (see generally, Tan Sri Richard Malanjum, 'The 17th Ahmad Ibrahim Memorial Lecture – The Role of Dissenting Judgments' (19 October 2018); and *Additional District Magistrate Jabalpur v. SS Shukla etc* 1976 AIR 1207, per Khanna J at p 1277).

(emphasis added)

[53] Therefore, the law is clear on this: the FC itself does not provide any procedure or provision for such constitutional compensation. Any claim for monetary redress in such cases must be done under and bound by the provision of relevant legislation. In view that the matter here is concerning damages due to the death in police custody, the action is within the confines of s. 7 and s. 8 of the CLA and s. 2 of the PAPA.

A [54] The decision in *Nurasmira* (*supra*) also highlighted that the only law available to a claimant suing on behalf of the estate of the deceased person is the CLA and that includes the limitation prescribed by s. 8 of the CLA. The majority view of the Federal Court in this case as delivered by Her Ladyship Zaharah Ibrahim FCJ (as she then was) (at pp. 609 and 610 (CLJ); pp. 222 and 223 (MLJ)) was that:

B [79] As submitted by learned senior federal counsel, at common law, the death of a person is not considered an injury and personal actions do not survive the death of the injured person, nor can any claim be brought consequent to such death. This position was mitigated by statutory provisions in England and similar statutory provisions were incorporated into various statutes in this country.

C

[80] The CLA, which consolidates the provisions of the various statutes, incorporates those statutory provisions in Part III of the Act.

...

D [83] In other words, as the right of the dependants of a deceased person and the estate of a deceased person to claim for damages is conferred by statute, that claim must be determined strictly within the confines of the statute.

E [55] Her Ladyship also referred to the case of *Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299; [1982] 1 MLJ 269 which explained the rationale behind s. 7 and s. 8 (at p. 302 (CLJ); p. 270 (MLJ)):

F At common law the death of a person gives rise to two principles. **The first is that the death of any person is not a civil wrong.** Therefore, no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough CJ in *Baker v. Bolton* ruled that 'in a civil court the death of a human being could not be complained of as an injury'. **The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him.** In other words,

G the cause of action did not survive the death: *action personalis moritur cum persona* ...

H Had it not been for sections 7 and 8 of the Civil Law Act, it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular section 7, his case must stand and fall on the basis of these sections.

(emphasis added)

[56] The relevant part of s. 8 of the CLA is reproduced below:

8 Effect of death on certain causes of action

I (1) Subject to this section, *on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:*

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain part from the other or to any claim for damages on the ground of adultery.

A

(2) *Where a cause of action survives as aforesaid for the benefit of the estate of that person:*

B

(a) *Shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after the person's death; ...*

(3) Where damages has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

C

D

...

(5) *The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."* (emphasis added)

E

[57] Her Ladyship Zaharah Ibrahim FCJ in *Nurasmira (supra)* (at pp. 617 to 622), further reiterated that the cause of action saved by s. 8 of the CLA must exist prior to the death of the claimant:

F

[105] As was explained by this court in *Sambu Pernas*, causes of action vested in a person survive his death solely due to s. 8 of the CLA. Such survival is subject to the conditions set out in that section, one of which is that **damages which can be awarded for the benefit of the estate of such deceased person cannot include exemplary damages**. As was also stated in *Sambu Pernas*, the claim of a person claiming on behalf of the estate of a deceased person under s. 8 must 'stand and fall' on the basis of that section.

G

...

H

[125] Clearly therefore the causes of action that are saved by s 8 must be causes of action that existed prior death. Acts done or omitted to be done in relation to a person after his death cannot possibly give rise to any cause of action that could vest in him prior to his death.

(emphasis added)

I

A [58] The *ratio* of *Nurasmira (supra)* was then referred by Rhodzariah Bujang FCJ in *Koperal Zainal (supra)* (at pp. 173 to 174 (CLJ); p. 405 (MLJ):

[27] Thus, in view of art. 162(6) and the aforesaid settled principles on statutory interpretation, the question which we posed to ourselves in order to answer the legal poser granted in the leave to appeal is this: Is
B s. 8 of the CLA incongruous with art. 5 of the Federal Constitution? My answer to that is a definite no, for as laid out in *Rooke's* case, *in order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour for its object is not to compensate him but to punish the defendant and to deter him and others* in the same shoes or similar position from committing such wrongs. In the words of Lord Devlin in *Cassell & Co Ltd v. Broome* [1972] AC 1027 at p. 1126:
C

The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment: he can only profit from the windfall if the wind was blowing his way.

D *Given that the deceased victim is not suing but his estate is, that condition for exemplary damages is not met in this case.*

(emphasis added)

E [59] In short, s. 8(2) of the CLA expressly disallows exemplary damages in such cases and, based on the authorities mentioned above, notwithstanding the infliction of grievous wrong transgressing a person's life, the court could not afford other remedy except for what has been mentioned in s. 8 of the CLA. This is also because there is no express provision in the FC allowing the bringing of an action to redress such wrong.

F [60] Likewise, in our present case, the victim of the punishable behaviour himself was not suing in this case but the suit was brought by his heir. Therefore, the condition for the grant of exemplary damages was not fulfilled. The next available remedy for the plaintiffs would then be the aggravated damages. In *Koperal Zainal (supra)*, after deciding that the deceased victim was not suing and thus no exemplary damages could be awarded, the
G apex court went on to award RM200,000 aggravated damages. Nonetheless, the plaintiffs in our present case could not be awarded any aggravated damages in view of the dearth in numerous aspects of their case which shall be discussed below.

Locus Standi

H [61] Unlike *Nurasmira (supra)* and *Koperal Zainal (supra)*, the plaintiffs in our present case are not suing on behalf of the estate. This can be seen from the intitlement where they specifically state that they are the widow and children of the deceased. Nowhere in the affidavit in support affirmed by P1, has P1 averred anything on this. As mentioned earlier, Zaharah Ibrahim FCJ
I (as Her Ladyship then was) has made it clear that the only law applicable for a claimant in such situation is the CLA especially ss. 7 and 8 of the CLA with the limitations therein. Since the plaintiffs were not the victims themselves

to such punishable behaviour, s. 8 of the CLA cannot be of any assistance to them. The plaintiffs in their cause papers or their submissions have also not forwarded any explanation to this court whether they are suing under s. 7 of the CLA. Section 7 of the CLA says:

7 Compensation to the family of a person for loss occasioned by his death

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].

(2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.

(3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

...

(5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

(6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect, or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.

(7) The plaint or writ or summons in any such action shall give full particulars of the person or persons for whom or on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

(8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

(emphasis added)

A [62] If indeed the plaintiffs are suing under s. 7 of the CLA, they have not produced any proof or evidence or confirmation under s. 7(2) or s. 7(8). (See *Kaliamah Rajan & Yang Lain lwn. Superintenden Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain* [2020] 9 CLJ 252; [2020] 12 MLJ 334 and *Khairul Anwar Abd Aziz & Anor v. Pakiam Vitilingam & Anor* [2009] 1 LNS 1618; [2010] 7 MLJ 372) Also, if they are indeed relying on any of the provision in s. 7 of the CLA, they are, unfortunately, time-barred due to the three-year limitation period laid down in s. 7(5) of the CLA.

B [63] If, however, they are suing in their own capacities, the affidavit in support of encl. 1 should have detailed out their case in order to establish their cause of action. This is especially so when the reliefs sought are for compensation (prayer 2) and the exemplary damages (prayer 3) to the plaintiffs. They must have been the victims of the conduct of the defendants which merits such redress and punishment. The claimant in such case can only profit from the windfall if the wind was blowing his way (per Lord Devlin in *Cassell & Co Ltd v. Broome* [1972] AC 1027 at p. 1126).

C [64] In the words of Rhodzariah Bujang FCJ (in *Koperal Zainal (supra)* at para. [27] (CLJ); p. [132] MLJ):

E ... in order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour for its object is not to compensate him but to punish the defendant and to deter him and others in the same shoes or similar position from committing such wrongs.

F [65] Yet, encl. 1 and the supporting affidavit in encl. 2 are unclear on this. The only where in the said affidavit in support which could shed light on this is in para. 11. In para. 11, P1 has averred that:

G 11. Saya dengan penuh hormat menyatakan bahawa Defendan-Defendan yang telah mengakibatkan kematian arwah suami saya, telah memungkir hak kami, untuk kehidupan dan kebebasan serta hak asasi yang dijamin oleh Perkara 5(1) Perlembagaan Persekutuan. Arwah suami saya meninggal dunia berikutan kecederaan-kecederaan pada badannya, yang diakibatkan tidak terhad oleh Defendan-Defendan Ke-7 dan Ke-8, dan/atau disebabkan ketinggalan perbuatan Defendan-Defendan untuk menyediakan keselamatan dan mengambil langkah-langkah keselamatan yang perlu di dalam Lokap. Defendan-Defendan, dengan itu, harus bertanggungjawab untuk mengganti rugi kemungkiran tersebut untuk kesalahan tort yang telah dilakukan.

H [66] It therefore shows that the plaintiffs are claiming the right to compensation because of the breach of their art. 5 constitutional right. The plaintiffs have not discussed nor established the link of encl. 1 with art. 5. They have not forwarded any explanation how this case is relevant to the alleged art. 5 violation of their right.

I

[67] Since the case here has nothing to do with the plaintiffs' lives, the nearest to the plaintiffs' case would then be "personal liberty". The word "liberty" has been defined in *Black's Law Dictionary* (7th edn) as, "freedom from arbitrary or undue external restraint, esp by a government or a right, privilege, or immunity enjoyed by prescription or by grant; the absence of a legal duty imposed on a person (the liberties protected by the Constitution." Meanwhile, the phrase "personal liberty" is defined as one's freedom to do as "one pleases, limited only by the government, esp in the making and administration of laws."

[68] *Halsbury's Laws of Malaysia, Constitutional Law* (vol. 3(3)), has elaborated the following with regards to the phrase "personal liberty" in art. 5 of the FC:

[100.030] Background to guarantee of personal liberty

The guarantee in the Federal Constitution that a person will not be deprived of his life or personal liberty appears to owe its origin to the Indian Constitution. There is, however, a difference between the two provisions, in that the Malaysian provision makes no mention of procedure. Comparisons between the provisions of the two Constitutions have been made in various cases. ...

[100.32] Interpretation of the liberty of the person

However, the Malaysian courts still adopt a conservative approach by generally disagreeing to interpret 'personal liberty' generously to include all facets which are an integral part of life itself and those matters which go to form the quality of life and therefore does not import the right to a passport right of travel and the right to gainful employment. Further, person is held to be not deprived of his right to personal liberty when there is a suspension of driving licence. But a person's right to liberty has been held to be infringed when there was an unlawful police bail which subjected a person to a form a restraint or coercion.

(emphasis added)

[69] Personal liberty in the constitutional context has been defined by Suffian LP in *Government Of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22; [1979] 2 MLJ 33 where he stated at pp. 34 to 35:

Article 5(1) speaks of personal liberty, not of liberty *simpliciter* ... It is well settle that the meaning of words used in any portion of a statute and the same principle applies to a constitution depends on the context in which they are placed, that applies to a constitution depends on the context in which they are appear and that they may be given a wider or more restricted meaning that they ordinarily bear if the context requires it. In the light of this principle, in construing 'personal liberty' in art. 5(1) one must look at the other clauses of the article, and in doing so we are convinced that *the article only guarantees a person, citizen or otherwise except any enemy alien, freedom from being 'unlawfully detained'; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defendant by his own lawyer; the right to be released without undue delay*

- A *and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to have a passport. Indeed, freedom of movement is dealt with specifically in art 9 which, however, only guarantees citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein.*

(emphasis added)

- C [70] This was followed by the Federal Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105 where Mohamed Dzaiddin FCJ (as he then was) stated at pp. 137 to 138:

- D *We therefore disagree with the Court of Appeal that the word 'personal liberty' should be generously integral part of life itself and those matters which form the quality of life. We are of the view that other matters which go to form the quality of life have been similarly enshrined in Part II of the Constitution under Fundamental Liberties ... We agree that the learned State Attorney General that the entry permit only allows the respondent to enter and reside in Sabah, but ipso facto the entry permit does not confer any right to livelihood to the respondent.*

(emphasis added)

- E [71] Thus, the plaintiffs' case here has nothing to do with their "personal liberty". This was also discussed by His Lordship Syed Ahmad Helmy Syed Ahmad JC (as he then was) in *Harmenderpall Singh Jagara Singh v. PP* [2004] 1 LNS 555; [2005] 2 MLJ 542. In this case the court made it clear that the allegations on which the violation of a constitutional provision is based must be specific, clear and unambiguous and must contain sufficient particulars. His Lordship held that:

- G [11] On the issue of violation of art. 5(1) of the Federal Constitution it is settled law that the allegations on which the violation of a constitutional provision is based must be specific, clear and unambiguous and must contain sufficient particulars (see *Bank of Baroda v. R Nagachaya Devi* AIR 1989 2105).

- H [12] Hence it is imperative that the applicant's affidavit must condescend to providing specific, clear and unambiguous particulars and basis to support the averment of unconstitutionality of s. 41(5) RTA in violation of art. 5(1) of the Federal Constitution, which upon a careful perusal, I find lacking. **In any event art 5(1) confers constitutional protection of life and personal liberty which does not extend to the applicant's right to livelihood.**

(emphasis added)

- I

[72] In our present case, in view that the plaintiffs have decided to begin the proceeding by way of originating summons, all the details to substantial the claims must be detailed out in the affidavit in support and/or affidavit in reply. But for a simple averment in para. 11 of the affidavit in support, nothing has been forwarded by the plaintiffs in their affidavits or even the submission to explain how the death of the deceased would affect the plaintiffs' right under art. 5 of the FC.

[73] How could the plaintiffs here succeed in their claim if they have not even established their cause of action? The plaintiffs must establish and explain how the death of the deceased has caused the violation of their right under art. 5 of the FC. The plaintiffs submitted that they are seeking a declaration before this court and that declaratory reliefs do not require them to show any cause of action. The plaintiffs further argued that they do not have to establish legal rights before a declaration obtained by this court because a declaratory action can generate rights. Alternatively, the plaintiffs later contended that the cause of action in this present suit is best described as a custodial death of the deceased occasioning a violation of art. 5(1) of the FC.

[74] The defendants on the other hand, premised that the plaintiffs' claim is based on s. 7(2) of the CLA. It is clear that this section does not give the right to the estate of the deceased to make a claim because they have not produced any letter of administration.

[75] The then Federal Court in the case of *Sambu Pernas (supra)* critically addressed the legal questions pertaining to dependency claims. The court at p. 302 held:

... the first principle which regarded death as not giving rise to any cause of action was rectified by s. 1 of the Fatal accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act 1934. The provisions of these two UK statutes are now incorporated in ss 7 and 8 of our Civil Law Act 1956. Had it not been for ss. 7 and 8 of the Civil Law Act ... **it is clear that the respondent could not have the right to bring the suit**, and having acted under these sections and in particular s. 7, his case must stand and fall on the basis of these sections. (emphasis added)

[76] In the Court of Appeal case of *Wakil-Wakil Diri Kepada Mahadevi Nadchatiram (Deceased) v. Hong Leong Bank Bhd* [2014] 1 LNS 755, Hamid Sultan Abu Bakar JCA (delivering the judgment of the court) held that:

[13] ... We have read the appeal record and the submission of the parties in detail. The court is grateful to the comprehensive submissions of the learned counsel. After much consideration to the submission of the learned counsel for the respondent, we take the view that this is a fit and proper case to allow the appeal. Our reasons *inter alia* are as follows:

- A (a) It must not be forgotten *that when the deceased dies the estate appointing the Executor and/or Executrix of the will, the locus start from the minute of the deceased death. However, the intestate matters a letter of administration must be obtained and the sealed order must be extracted to be cloaked with locus standi* (see *Ingall v. Moran* [1944] 1 KB 160).
- B (emphasis added)
- [77] The same principle was held in the case of *Kamarul Ariffin Jait & Ors v. Zuraini Osman* [2016] 8 CLJ 257; [2016] MLJU 1228, SM Komathy JC (as she then was) in her judgment held that:
- C [20] That is sufficient to dispose of this appeal. For completeness, however, and in defence to counsel's full argument, I propose to deal briefly with one other area of submission under this head. It was the submission that the plaintiffs was precluded by law from commencing this action until the extraction of the grant of the letters of administration of the deceased. The answer to this submission is to be found in section 7 of the Civil Law Act ...
- D [21] The foregoing provisions put paid to the position taken by the plaintiff that **the present action could not have been brought by the plaintiff before the extraction of the grant of the letters of administration.**
- E (emphasis added)
- [78] In the appeal of the 2018 suit (*Kaliamah Rajan & Yang Lain lwn. Superintenden Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain* [2020] 9 CLJ 252; [2020] 12 MLJ 334) the Court of Appeal has affirmed the judgment held by the High Court on the issue of *locus standi*.
- F Yaacob Md Sam JCA in his judgment held that (at pp. 271 to 272 (CLJ); p. 352 (MLJ):
- G [40] Perayu-perayu telah memplidkan dua kausa tindakan terhadap responden-responden, iaitu kausa tindakan kecuaian dan kausa tindakan di bawah s. 7 Akta Undang-Undang Sivil 1956. *Perayu-perayu ketika membawa tindakan ini bukanlah wasi (executor) kepada si mati dan dengan itu gagal mematuhi pra-syarat s. 7(2) Akta Undang-Undang Sivil 1956 ...*
- ...
- H [44] Kami mengamati penghakiman YA Pesuruhjaya Kehakiman untuk isu ini. Dalam perenggan [14] dan [15] penghakiman, YA pesuruhjaya kehakiman *memutuskan bahawa perayu-perayu tidak mempunyai locus standi untuk membawa tindakan ini*. YA pesuruhjaya kehakiman juga memutuskan perayu ketiga seorang kanak-kanak bawah umur tidak kompeten untuk membawa tindakan ini di atas Namanya sendiri yang bukan melalui wakil litigasinya, dan oleh itu bertentangan dengan kehendak peruntukan A. 76 k. 2(1) Kaedah-Kaedah Mahkamah 2012. *Kami tidak mendapati YA pesuruhjaya kehakiman melakukan kekhilafan dalam keputusannya apabila membenarkan permohonan responden-responden untuk membatalkan tindakan perayu-perayu atas isu ini.*
- I (emphasis added)

[79] In our present case, the plaintiffs have never specified clearly on which law and provision they are bringing this action. If they are suing on behalf of the estate (s. 7(2)) or they are suing under s. 7(8) or any other section of the CLA, they must clearly state so in encl. 1 or encl. 2 with relevant exhibits. They have failed to do so. If indeed they are suing on behalf of the estate under s. 7(2), the letter of administration has not been exhibited. The only conclusion is that they are suing in their own capacities. In such situation, the discussion above has also confirmed that they have no *locus* to do so.

[80] Thus, on all counts, the plaintiffs have failed to establish their claim for compensation for the alleged constitutional violation.

Section 2(a) Of PAPA

Res Judicata

[81] The plaintiffs also pray for a declaration that s. 2(a) of PAPA is *ultra vires* the FC (“prayer 4”) and a consequential order that s. 2(a) of PAPA be modified, and the time limitation stated in it be amended to 72 months (“prayer 5”). For ease of reference, s. 2(a) of PAPA is reproduced as follows:

2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provision shall have effect:

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after act, neglect or default complained of or, in the case of continuance of injury or damages, within thirty-six months after the ceasing thereof ...

[82] It is my view that, based on the cases quoted and discussed earlier, the attempted challenge on the constitutionality of s. 2(a) of PAPA was estopped by the doctrine of *res judicata* as expounded by the Supreme Court decision in *Asia Commercial Finance (supra)*. In particular, I am guided by the *ratio* of Peh Swee Chin SCJ (at p. 793):

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, ie, doctrine of estoppel per rem judicatum.

- A We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel per *rem judicatum*. It is particularly important to bear in mind the
- B question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation. (emphasis added)
- C [83] In rebutting the issue of *res judicata*, lead counsel for the plaintiffs argued that the legal issues in the present action and the 2018 suits are distinct as the prayer 4 and prayer 5 are about the constitutionality of PAPA and the 2018 suit was for damages under s. 7 of the CLA. Thus, the plaintiffs argued that the defendants are not being vexed again on the same issues that were
- D previously decided. They continued to submit that there is justification for the suits to be tried separately and it is not an abuse of the court's process.
- [84] With due respect, I do not agree with the plaintiffs. I am guided by the wider approach of *res judicata* applied by the Privy Council in the case of *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581 as follows:
- E The second question depends on the application of a doctrine of estoppel, namely *res judicata*. Their Lordships agree with the view expressed by McMullin J. That the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the
- F appellant is no. 534, Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matter which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100, 115,
- G where the judge says:
- ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of
- H matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce
- I a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[85] The decision of the Privy Council in *Yat Tung Investment Co Ltd (supra)* has been accepted by our Supreme Court in the case of *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1. In coming to its decision, the Supreme Court applied the wider approach of *res judicata* in *Yat Tung Investment Co Ltd (supra)* and held:

Based on the authorities I have referred to above, in my judgment, this is a clear case where the subject matter of the plaintiffs' claim in the present proceedings could and should have been pleaded in the defence in the Johor Bahru suit or raised as a triable issue under O. 14 application to the Johor Bahru suit. In the circumstances it would be an abuse of the process of the court to allow the 1st plaintiffs to bring a new proceeding in respect of the same issue which should have been litigated in the earlier Johor Bahru proceedings (*Yat Tung Investment, supra*. P. 590).

[86] Clearly, the plaintiffs in the present suit are attempting to re-litigate the similar, if not identical, issues of facts, law or mixed facts or law which had already been determined and decided in the 2018 suit pertaining to s. 2(a) of PAPA.

[87] That is to say, if we put the plaintiffs' applications side by side, they are in substance a reflection of each other. The fact that the suit between the plaintiffs and the defendants now would be based on the similar facts and issues that is s. 2(a) of PAPA, which had already been heard and disposed of amount to nothing but a sheer waste of time, cost and expenses of all involved.

[88] The plaintiffs' claim herein is particularly on the constitutionality of s. 2(a) of PAPA. The same and the declaration and orders in relation thereto in this present suit ought to have been raised in the 2018 suit *albeit* during the appeal at the Federal Court as they are based on the same facts and issues.

[89] Indeed the decision of the Court of Appeal in an earlier case of *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479 is of direct relevance to us. In that case, the appellant filed an application to set aside a default judgment for the second time on the basis that the default judgment ought never to have been entered in view of the agreement between the parties. The appellant had previously applied the same application for a different ground from that relied upon in this case. However, it was dismissed by the court. The Court of Appeal applied the wider sense of the doctrine of *res judicata* and held that the ground raised by the appellant belonged to the first application, but it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. As held by the Court of Appeal (at p. 567 (CLJ); p. 492D (MLJ)):

Applying the foregoing principle to the facts of the present case, it was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular for the reasons we have set out earlier in this judgment. It was therefore an issue which properly belonged

- A to the first application. *But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground.* It would, as Haidar JCA observed during the course of En Zainur's argument, amount to presenting one's case in instalments. That is something the law does not permit. (emphasis added)
- B [90] Likewise in this present suit, the plaintiffs did not explain the reasons why the issue on the constitutionality of PAPA was not raised during the appeal of the 2018 suit at the Federal Court. This was notwithstanding the fact that the 2018 suit was barred by s. 2(a) of PAPA in both the High Court and (on appeal) the Court of Appeal. This should have been raised in the appeals thereto. They did not. The law could not permit them to raise it now to complete another instalment of their case.
- C [91] Based on the foregoing, this court also finds that the issue of the constitutionality of PAPA has become a constructive *res judicata*. The Court of Appeal in the case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, where learned lead counsel for the plaintiffs Datuk Sri Gopal Sri Ram himself sat as one of the justices of the Court of Appeal, had explained the concept of constructive *res judicata*.
- D The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
- E The doctrine may thus be seen to encompass several categories. In its narrowest sense, *res judicata*, I think, refers to estoppel by record. It refers to the actual decision the earlier action or proceeding. *In its wider sense, it encompasses issues, and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to "constructive res judicata". It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.*
- F (emphasis added)
- G [92] The plaintiffs in our present case, could and should have brought and submitted the issue of the constitutionality of PAPA during the appeal of the 2018 suit before the Court of Appeal and the Federal Court respectively. Unfortunately, the plaintiffs have failed to do so. Thus, the plaintiffs are now caught and estopped by the doctrine of constructive *res judicata* to raise the issue of constitutionality of PAPA in encl. 1.
- H [93] In *Instant Bonus Development Sdn Bhd v. Wong Ching Yong & Anor; Malaysia Building Society Bhd (Intervener)* [2021] 1 LNS 1353; [2021] MLJU 1644; [2021] AMEJ 1362, Mohd Johan Lee JC stated the following:
- I

[64] Therefore, it is obvious that the plaintiff now is attempting to re-litigate the issues which had been litigated and disposed by the courts in the previous suits. The only different is that in this suit, the plaintiff would like to expressly allege that there is a conspiracy among the parties. *Bearing in mind all the parties and facts are the same in all these suits and that all the material facts are the same throughout, the adding of this conclusion in the finale to try the second bites of the cherry is but an abuse of court process.* While the plaintiff conveniently said that they had never raised the issue of conspiracy previously, as stated in *Yat Tung Investment Co Ltd* case (*supra*) and our *Kluang Wood* (*supra*) case and many other authorities cited above including *Tenaga Nasional* (*supra*) case, *it would be an abuse of the process of the court to allow the plaintiff to bring a new proceeding in respect of the same issue which should have been litigated earlier. Besides, the court will not permit or condone the same party to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in dispute, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plaintiff should naturally bring this up in the previous cases. They did not.* After numerous failed attempts to relitigate the same facts and causes of action against the same parties, they now try to change part of the packaging and attempt to bring a new case. *This practice of presenting one's case by instalments is an obvious case of abusing the court's process. It should not be permitted nor condoned.*

(emphasis added)

[94] To sum up, the declaration and order in relation to PAPA (prayer 4 and prayer 5) are barred by the doctrine of *res judicata*. However, for the completeness of discussion, I shall now deal with the other aspect of this issue. It is my view that even if the last two prayers sought for in encl. 1 in relation to s. 2(a) of PAPA are not barred by the doctrine of *res judicata*, the plaintiffs' claim here is still a flop due to the following reasons.

Constitutional Compensation And PAPA

[95] The plaintiffs have alleged that the claim here is not bound by PAPA because it is in relation to compensation due to the violation of their right guaranteed by the FC and PAPA is primarily in relation to tortious or contractual claims. The lead counsel for the plaintiffs has even mooted that there should not be any time limitation for any claim due to constitutional violation. Again, with respect, I disagree with the plaintiffs on this.

[96] As mentioned earlier, there is no specific law or provision in our FC authorising any claim for such compensation due to constitutional violation. Thus, as held by Rhodzariah Bujang FCJ in *Koperai Zainal* (*supra*), any claims for it, if at all, needs to be brought under the CLA.

[97] In a similar vein, for claims against public authorities, the only applicable statute is PAPA. s. 2(a) of PAPA is the most crucial and relevant to encl. 1. There is no other law applicable. Section 2(a) says:

- A 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person **for any act done** in pursuance or execution or intended execution of any written law or **of any public duty or authority** or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provision shall have effect ...
- B (emphasis added)
- C [98] It is clear that the crucial focus here is the phrase “for any act done”. Any act violating the constitutional right of a person done by another person in performing his public duty or authority is thus bound by PAPA, in particular this s. 2. This can also be seen from the reading of the long title of PAPA: ‘An Act relating to the protection of persons acting in the execution of statutory and other public duties.’ There is nothing in s. 2 nor any other places in PAPA to suggest that PAPA is only confined to contractual disputes or tortious liability. Instead, it covers all types of claims against the public authorities. Section 2(a) of PAPA is clear that for such a claim, the limitation is 36 months.
- D [99] This court refer to the case of *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245 where Nik Hashim JCA held (at pp. 257 to 258) that:
- E [18] In our judgment, s. 2(a) of the Act is a mandatory in its terms. The word ‘shall’ is used twice in that section indicating that the 36 months period in respect of time is mandatory requirement and it cannot be abridged. It is therefore clear that time starts to run from the act complained and not the communication of the decision as contented by the appellant. The ‘act’ in the present case is the decision of the board dismissing the appellant’s appeal.
- F ...
- G [20] It is worthy of note that the purpose of s. 2(a) of the Act is to give time period for any action brought against any person acting in execution of statutory or other public duty within 36 months after the act complained of. The 36 months period is incorporated into s. 2(a) as a reasonable period of time for such action and it is not for the court to query legislation but merely to give effect to the will of Parliament as expressed in law ...
- H [100] The Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 at p. 680 had laid down succinctly that:
- I [23] Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring remedy but not right to sue. That is not correct. **In so far as PAPA is concerned, the law is settled.** The Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56, held that limitation under PAPA is “just as much a “right” as any other statutory or contractual protection against a future suit”.

[24] In this respect, **both the Court of Appeal and the Federal Court have consistently struck out claims** when it was clear that the statute limitations would be relied on or raised. In *Alias Ismail v. Hairuddin bin Mohamad & Anor* [1997] 4 CLJ 669, the Court of Appeal held that the court has no discretion to set aside a defence of limitation. It was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show the plaintiff's cause of action was statute-barred and fail for that reason.

A

B

(emphasis added)

[101] On the other hand, it is also my finding that the filing of this action was done 7½ years after the death of the deceased, namely, 90 months after the demise (from 1 June 2013 until January 2021). This is way beyond the 36 months restriction imposed by PAPA. In fact, this 90-month period has deprived the plaintiffs not only from any claims under PAPA, but also from any claim even under the usual limitation of six years (*ie*, 72 months). Thus, their claim here is barred by the limitation set out in PAPA and even by the Limitation Act 1953.

C

D

[102] Besides, the plaintiffs' application in the earlier suit has been struck out because the limitation period prescribed in s. 2(a) of PAPA has set in. (See *Kaliamah Rajan & Yang Lain lwn. Superintenden Wooi Kooi Cheang, Ketua Polis Daerah Tampin, Negeri Sembilan & Yang Lain* [2020] 9 CLJ 252; [2020] 12 MLJ 334). Therefore, this court has no other reason to hear this matter again.

E

Equal Treatment

[103] I now move to the next point contended by the plaintiffs, namely, that s. 2(a) PAPA violates the right to equality guaranteed under art. 8 of the FC.

F

[104] On this issue, this court is guided first and foremost by the principle of presumption of constitutionality of a statute, namely PAPA in our present case. The Federal Court in its recent judgment in the case of *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581 held that:

G

[76] The presumption of constitutionality means that the Judiciary must presume that Acts legislated by Parliament to be constitutional ...

[105] Thus, guided by the above principle, this court shall presume that PAPA is constitutional.

H

[106] Also, it is a trite law that when the court is faced with the issue of constitutionality of a provision of a statute, the court should be slow in striking down the impugned provision for being unconstitutional. In the case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, learned lead counsel for the plaintiffs while he was sitting as the judge in the Court of Appeal had held that:

I

- A The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.
- B [107] The burden to prove that the impugned provision is unconstitutional lies on the persons alleging it to be otherwise as decided in the case of *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1. Unfortunately, the plaintiffs have failed to discharge this onus.
- C [108] For ease of reference, art. 8 of the FC is reproduced here:
8. (1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground of religion, race, descent, place or birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
- E (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any state.
- (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.
- F [109] I disagree with the plaintiffs that PAPA has provided different treatment and thus has violated art. 8 of the FC. Suffian LP, in *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 (at p. 166, para. E-I) has sharply explained the concept of equality under art. 8 of the FC:
- G In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above. We adhere to what was said in *Public Prosecutor v. Khong Teng Khen* [1976] 2 MLJ 166 at page 170:
- H The principle underlying art. 8 is that **a law must operate by alike on all persons under like circumstances**, nor that it 'must be general in character and universal in application and the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v. State of West Bengal* (AIR 1953 SC 404 406).
- I In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men,

or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases the law be said to violate art. 8. **All that art. 8 guarantees is that a person in one class should be treated the same as another person in the same class**, so that juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire pay the same income tax as another millionaire, and so on.

(emphasis added)

[110] In a recent Federal Court case of *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277 Azahar Mohamed CJ (Malaya) has synthesised it vividly (at pp. 184 to 185; pp. 314 to 315 (MLJ) that:

[72] At the outset, in view of the approach taken by the appellant, I think it will be helpful to begin the discussion by reiterating the basic principles governing the interpretation of cl. (1) of art. 8 of the FC. *Clause (1) of art 8 guarantees that a person in one class should be treated the same as another person in the same class.* (See *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 2 MLJ 166). The principles were clearly laid down by the Federal Court in the case of *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155. The relevant principles for our purpose are as follows:

- (i) *the equality provision is not absolute;*
- (ii) *the equality provision is qualified. Specifically, discrimination is permitted within cl. (5) of art. 8 and within art. 153;*
- (iii) *art 8 itself envisages that there may be lawful discrimination based on classification;*
- (iv) the first question for consideration: *is there classification?* If there is and subject to other conditions, the law is upheld. If there is no classification, the law is struck down;
- (v) discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, provided that:
 - (a) *the classification is founded on an intelligible differentia which distinguishes persons that are group together from others left out of the group; and*
 - (b) *the differentia has a rational relation to the object sought to be achieved by the law in question.* The classification may be founded on different bases such as geographical, or according to objects or

- A occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question; and
- (vi) *in considering art 8, there is presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification, which the Legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.*
- B
- (emphasis added)
- [111] In response to the allegation that s. 2(a) of PAPA *ultra vires* art. 8(1) of the FC, the defendants submitted that art. 8 of the FC is not absolute where it allows ‘lawful discrimination’ based on ‘reasonable classification’. To this,
- C I agree.
- [112] In *Letitia Bosman (supra)* it was further held by majority of the court that:
- D [75] ... Equality before the law and equal protection of the law require that **like should be compared with like**. What our art 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances.
- E [76] Clause (1) of art 8 is not concerned with equal punitive treatment for equal moral blameworthiness but is concerned with equal punitive treatment for similar legal guilt. In matters relating to equal protection the basis of approach is the identification of legislative purpose and a **reasonable classification is one that includes all persons who are similarly placed with respect to the purpose of the law** (see *Che Ani bin Itam v. Public Prosecutor* [1984] 1 MLJ 113).
- F
- (emphasis added)
- [113] In the Federal Court case of *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, His Lordship Raja Azlan Shah FJ (as His Lordship then was), further explained the concept of equality under art. 8 of the FC as:
- G Equality before the law and equal protection of the law under art. 8(1) require that like should be compared with like.
- [114] Guided by the (then) Federal Court judgment in the case *Loh Kooi Choon (supra)*, the concept of equality under art. 8 of the FC requires persons
- H of same class to be treated equally.
- [115] The same principle was further explained by the Federal Court in the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 at p. 725, His Lordship Augustine Paul JCA (as he then was) held that:
- I Thus, what art 8(1) means is that there must be a *subjection to equal laws applying alike to all persons in the same situation* (see *Vide Southern Railway Co v. Greene* 216 US 400). *The validity of a law relating to equals can therefore be properly tested if it applies alike to all persons in the same group.* This can only

be ascertained by the application of the doctrine of classification ... *A law would be regarded as discriminatory only if it discriminates one person or class of persons against other similarly situated and denies to the former the privileges that are enjoyed by the latter.* (emphasis added)

A

[116] It is my view that in our present case, there is no discrimination to the plaintiffs. Nor is there any unequal treatment here. Persons acting in the execution of statutory and other public duties are classified as different classes of persons from the ordinary persons who are not acting in the execution of statutory and other public duties. A Person or group of persons protected by PAPA cannot be considered as similar to the other person or group of persons who are left out by PAPA. That is the reasonable and permissible classification founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group.

B

C

[117] I also refer to the latest decision of our Federal Court in *Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals* [2022] 3 CLJ 177 where art. 149 of the FC and the Prevention of Crime Act 1959 were alleged to be in contravention of art. 8 of the FC. Delivering the unanimous decision of the court, Nallini Pathmanathan FCJ explained that:

D

[187] *Article 8(1) FC does not require all persons in all circumstances to be treated alike. Reasonable classification is permitted if it is based on intelligible differentia and shows a nexus between the basis of classification and the object, sought to be achieved by the statute in issue.* As held by Eusoffe Abdoolcadeer FCJ in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116:

E

The general basic principle culled from the authorities and judicially determined, succinctly put is that art 8(1) FC permits reasonable classification founded on intelligible differentia, having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

F

...

G

[192] In these extreme circumstances, the rational and reasonable construction to be accorded to these differing modes of treatment is that the FC recognises and has accorded special powers to Parliament to legislate differently for non-citizens as compared to citizens in relation to matters of national security. The reason why there is a distinction between citizens and non-citizens is because the FC recognises that when it comes to national security, Parliament is entitled and therefore empowered to treat nationals and non-nationals in a different way.

H

[193] It is reiterated that Part XI FC deals specifically with national security and how to deal with threats against such risk. The risk posed by citizens and non-nationals may well be dissimilar and diverse. Accordingly, the promulgation of legislation which treats the two categories of persons differently is premised on a rational basis, namely distinct and intelligible criteria, which meets the objective of art. 149 FC.

I

- A As such there is no contravention of art. 8(1) FC. It might well have been different if preventive detention under POCA or legislation pursuant to art. 149 FC expressly provided that such detention without trial was only available against non-citizens as compared to citizens. It would have been difficult to justify compliance with art. 8(1) FC, given the clear preference accorded to citizens as opposed to non-citizens. It would also potentially contravene international standards.
- B [194] We are aware that in the instant case we are dealing with art. 149 FC and that in dealing with the contention that it contravenes art. 8(1) FC, we are applying the test normally utilised for legislation enacted pursuant to the FC rather than the articles of the FC itself.
- C Notwithstanding this, the issue at hand is the same, namely whether art. 8(1) FC has been contravened. *The test therefore remains the same, namely whether there is a coherent basis for the differentiation premised on intelligible differentia which has a rational nexus to the policy or objective of the statute or the article in question.*
- D [195] We, therefore, conclude that in view of the intelligible differentia between citizens and non-citizens or non-nationals more particularly in the context of the singular nature of art. 149 FC which deals with the special powers afforded to Parliament in relation to national security and emergency, the lack of provision of this further safeguard in art. 151(1)(b) FC does not offend art. 8(1) FC. This is particularly so as the fundamentals of natural justice are accorded due recognition and effect in art. 151(1)(a) FC.
- E

(emphasis added)

- F [118] In a similar vein, a close analysis of PAPA will confirm the earlier discussion that the 36-month limitation does not in any way run awry of art. 8 of the FC which guarantees equality treatment under the law to all persons. The long title of PAPA has made it crystal clear that it is 'an Act relating to the protection of persons acting in the execution of statutory and other public duties.' Hence, it is a statute to lay down the requirements of any action against any person carrying out his or her public duties. One of the conditions (as per s. 2) is that such action must be commenced within 36 months after the act complained. The Legislature had enacted PAPA relating to the protection of persons acting in the execution of statutory and other public duties which is different from the ordinary person. Clearly, the intention of the Parliament is to differentiate the law relating to an action against the persons acting in the execution of statutory and other public duties as opposed to the ordinary person. The long title has borne out and lent support to the limited reading espoused above.
- G
- H
- I [119] Persons acting under the statutory and public duties on one hand and the ordinary person, on the other hand, are two different groups of persons. His Lordship Suffian LP (as he then was) in delivering the judgment the Federal Court case in *Datuk Hj Harun Hj Idris (supra)* (at p. 166 (MLJ)) had emphasised that:

9. In considering art. 8 there is a presumption that impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

A

[120] This court also found that when a law is challenged for violating the equality under art. 8 of the FC, the court may investigate the purpose and policy of the enactment of the law itself. His Lordship Hashim Yeop A Sani J (as he then was), in the case of *PP v. Su Liang Yu* [1976] 1 LNS 113; [1976] 2 MLJ 128, held (at p. 130h) that:

B

When a law is challenged as offending the guarantee of equality and equal protection of the law, the first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute and then to see whether a classification has been made and which does not result in real or actual discrimination.

C

[121] This court is in total agreement with this. PAPA is a piece of legislation aims to give protection to certain classes of persons who are acting under the statutory duties and other public duties. It is clear that the Legislature's policy and intention to accord such protection to this group of persons. Further, this protection is not available to the other class of persons or the ordinary person who are not exercising statutory and public duties. This court finds that this classification is valid. The classification is founded on an intelligible differentia which distinguishes persons who are grouped together from others left out of the group.

D

E

[122] In the case of *Malaysian Bar & Anor v. Government Of Malaysia* [1987] 1 CLJ 459; [1987] CLJ (Rep) 185, Salleh Abas LP of the Supreme Court explained that the doctrine of classification is an integral part of the equal protection clause (at pp. 192a-c):

F

The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as *inter alia* age, ability, education, height, size, colour, wealth, occupation, race and religion. Any law made by a legislature must of necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: **If the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid.** If on the other hand, there is no such relationship the difference is stigmatised as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause.

G

H

I

(emphasis added)

A [123] Further, the rationale for the presumption of constitutionality built on the basis that the Parliament is in better position than the court to decide on social policy. As observed by Zabariah Mohd Yusof FCJ in *Rovin Joty (supra)* that:

B [77] Hence distilling from the above authorities, the rationale for the presumption constitutionality is because Parliament is in a better situation to decide on social policy matters rather than the courts. Parliament represents the will of a democratically elected majority, hence their decision ought to be accepted as legitimate. The courts, which are not elected from the will of the population, are in no position to determine on policy matters, are tasked with resolving of disputes independent from the influence of the media, popular public opinion or pressure groups in the analysis and application of legal rules and principles and interpretation of legal texts.

D [124] Therefore, based on the foregoing, this court does not agree with the plaintiff's submission that PAPA *ultra vires* art. 8 of the FC. PAPA treats all litigants who have any claim against public authorities alike. There is no discrimination whatsoever in it.

E [125] To summarise, s. 2(a) of PAPA treats all claimants in alike situations equally: if they are suing the public authorities, the limitation period is three years. This classification is also not, in any way, violating art. 8 of the FC. There is nothing of unequal treatment there.

Modification

F [126] I now deal with the plaintiffs' application for a consequential order to modify s. 2(a) PAPA in accordance with art. 162(6) and (7). The plaintiffs submitted that s. 2(a) is a pre-Merdeka law which engages art. 162(6) of the FC. This section, according to the plaintiffs, should be modified to bring it in accord with the FC.

[127] The relevant provisions of art. 162(1), (6) and (7) of the FC state that:

G **Article 162**

H (1) Subject to the following provisions of this article and art. 163, the existing laws shall until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and subject to any amendments made by federal or State law.

(6) any court or tribunal **applying the provision of any existing law which has not been modified on or after Merdeka Day** under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provision of this Constitution.

I (7) In this article **"modification" includes amendment, adaptation and repeal.**

(emphasis added)

[128] I again find great guidance in the judgment of Azahar Mohamed CJ Malaya in *Letitia Bosman* (*supra*) where it was held that being a pre-merdeka law, the law cannot be declared void or invalid:

[15] ... Thus being a pre-merdeka law, s. 302 of the Code cannot be declared void or invalid pursuant to art. 4 of the FC, as opposed to post-merdeka law (see *Jamaluddin bin Mohd Radzi & Ors v. Sivakumar a/l Varatharaju Naidu* [2009] 4 MLJ 593). **If at all there is any inconsistency between the provision and the FC, then cl. (6) of art. 162 must be invoked to remove the inconsistency.** (emphasis added)

[129] Indeed Her Ladyship Rhodzariah Bujang FCJ in *Koperal Zainal* (*supra*) couldn't be clearer, at pp. 171 to 173 (CLJ); pp. 403 to 404 (MLJ), that:

[19] Stating the obvious, our task in this appeal is simple enough, which is, interpreting s. 8(2) whose words are plain and unambiguous. The process of that interpretation, however, is not equally so, as elucidated by Zainun Ali, FCJ in *Kugan's* case, *our CLA is a pre-Merdeka law, which means that constitutional right to life under art 5(1) of the Federal Constitution was not in the contemplation of the legislature when the CLA, specifically s. 8(2) was enacted.* Nevertheless, the legal principle governing statutory interpretation is well settled in that where the words of the statute is clear and unambiguous, the court must give effect to its natural and ordinary meaning. The often-quoted statement of Lord Reid in *Pinner v. Everett* [1969] 1 WLR 1266 at p. 1237 on that principle is reproduced below:

In determining the meaning of any word or phrase in a statute the first question to ask always is what the natural or ordinary meaning of the word or phrase in its context in the statute is. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that is proper to look for some other possible meaning of the word or phrase.

...

[24] Article 162(7) defines *modification* to include *amendment, adaptation and repeal*. That is the express power given to the court when it comes to pre-Merdeka law, that is to modify the same when there exists a conflict between the two. To me the *invocation of the said power is only when there is an existence of such a conflict is because of the clear intention expressed in the words of the said provision which I have emphasised above for in the absence of such conflict, there is no reason at all to 'bring it into accord' with our constitutional provision.* In other words, there is a presupposition from the clear wordings of art 162 on the existence of the said conflict before the court's power to modify the existing law can be invoked. Hence the invocation of the said power is only justified when the conflict exists. (emphasis added)

- A [130] The same was also explained by Ong Hock Thye CJ (Malaya) in *Assa Singh v. Mentri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30 (at p. 35):

B In the third place, I agree that, since article 4 speaks only of laws passed after Merdeka Day, the validity or otherwise of the pre-Merdeka Restricted Residence Enactment will have to be considered solely by reference to article 162. The point is summed up most admirably by the learned Solicitor-General as follows:

C As to post-Merdeka law, the Constitution is supreme and if any of that law is inconsistent with the provision of the Constitution, to the extent of such inconsistency that law shall be void – article 4(1). *But as regards pre-Merdeka Law, such law shall continue to be in force until repealed: in the meantime, its continuity and enforceability is subject to modification, firstly, by a Legislative Act or Enactment or, secondly, by process of judicial interpretation, the Executive order of the Yang di-Pertuan Agong to modify the same having expired – article 162(1) and (6). It must be noted that article 162 does not use the expression that the pre-Merdeka law shall be void to the extent of the inconsistency but, instead, it expressly stated that the law shall continue to be in force.*

(emphasis added)

- E [131] As discussed earlier, this court finds that s. 2(a) of PAPA is not in conflict with the FC. Thus, guided by the principle established in *Letitia Bosman (supra)* and *Koperal Zainal (supra)* that modification is only required if there is any conflict, it entails that modification to PAPA is not required.

- F [132] Even if I am wrong on the above, the defendants have brought it to the attention of this court that s. 2(a) of PAPA was amended in 1974. This is as mentioned in *Kenderaan Bas Mara v. Yew Bon Tew & Anor* [1979] 1 LNS 38; [1980] 1 MLJ 311 at p. 311:

G Paragraph (a) of section 2 of the Public Authorities Protection Act 1948 which provided that action shall not lie or be instituted “unless it is commenced within twelve months next after the act complained of”, was amended with effect from June 1974 by section 2 of the Public Authorities Protection Act (Amendment) Act 1974 (Act A252) by the deletion of the words “twelve months” wherever appearing in paragraph (a) of section 2 and substituting therefor the words “thirty-six months”.

- H [133] The pre-merdeka 12-month limitation was duly changed (post-merdeka) to 36-month limitation by the Public Authorities Protection Act (Amendment) Act 1974. Thus, it is clear that PAPA, particularly s. 2(a) of PAPA has been amended post-Merdeka. The 36-month limitation is nothing pre-merdeka. No further judicial modification is needed in such situation.

- I [134] The averment by the plaintiffs that the 1974 Act has only partially modified PAPA and judicial modification is still needed, with due respect, is, in my view, misconceived. The core of their argument under prayer 5 is that s. 2(a) of PAPA is pre-merdeka and thus must be modified by the court

due to the 36-month limitation. The 1974 Amendment Act was passed post-merdeka to reflect the 36-month current bar for any such actions. Regardless of whether it is full modification or partial modification, this amendment is sufficient to make it (the 36-month limitation) a legal modification post-merdeka. Therefore, no further modification is needed on the limitation period laid down therein.

[135] To sum up, the provision therein is clear and unambiguous. There is also no conflict between the provision in PAPA with the FC. Thus, there is no need for this court to invoke art. 162(6) of the FC. It is therefore incorrect for the plaintiffs to allege that it was a pre-merdeka law which has not been modified or amended post-merdeka. It is also incorrect to argue that, in order to bring it in accord with the FC, this court must order for such modification now.

[136] On the side note, as observed earlier, 90 months have passed between the day the deceased passed away and the date encl. 1 was filed. The modification of s. 2(a) of PAPA as sought by the plaintiffs in prayer 5 (changing the limitation of 36 months to 72 months), if at all granted by this court, would not in any way makes this action within time. The plaintiffs' encl. 1 is time-barred on all counts.

Conclusions

[137] To put it concisely, the plaintiffs have failed to establish their case. The prayers sought by the plaintiffs are without merit. The FC has no provision for any monetary redress under it in the event of any violation of the rights guaranteed under the FC. Hence, the plaintiffs' claim must come under the existing provision of relevant statutes. Exemplary damages is not available for the plaintiffs because the condition in s. 8(2) of CLA cannot be fulfilled. The plaintiffs' claim for compensation inclusive the claim for aggravated damages is also not successful because of the issue on the *locus standi* of the plaintiffs.

[138] Since encl. 1 here is against public authorities, it must be subjected to the provision in PAPA. Enclosure 1 was filed 90 months after the death of the deceased. Thus, encl. 1 is time-barred. The time permitted for the plaintiffs to bring forward the action in our present case has long passed beyond the time restriction set under all legal provisions inclusive of s. 2(a) of PAPA. Also, prayers 4 and 5 are barred by the doctrine of *res judicata*. The plaintiffs should have brought the matter particularly on the constitutionality of s. 2(a) of PAPA in the earlier proceeding. Besides, there is nothing unconstitutional in s. 2(a) of PAPA. No judicial modification is needed. Enclosure 1 is hereby dismissed.

A

B

C

D

E

F

G

H

I